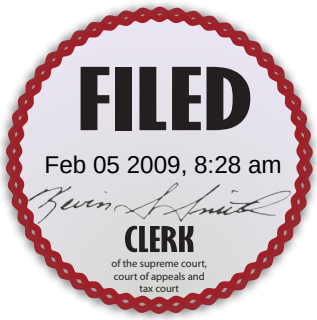

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IN THE
COURT OF APPEALS OF INDIANA

GREGORY HOLLAND,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 24A05-0807-CR-423
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE FRANKLIN CIRCUIT COURT
The Honorable J. Steven Cox, Judge
Cause No. 24C01-0606-FB-356

February 5, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Following a jury trial, Gregory Holland was convicted of Aiding, Inducing, or Causing Arson,[1] a class B felony, and Distributing a Destructive Device to a Minor,[2] a class B felony. Holland was subsequently sentenced to concurrent twenty-year terms. On appeal, Holland presents three issues for our review:

1. Is the evidence sufficient to support Holland's convictions?

2. Do Holland's convictions for aiding, inducing, or causing arson and distributing a destructive device to a minor violate the State's prohibition against double jeopardy?

3. Is the restitution order supported by sufficient evidence?

We affirm in part, reverse in part, and remand.

The facts most favorable to the convictions follow. During the afternoon and evening hours of June 6, 2006, D.L., C.L., J.G., and D.G. all congregated at Holland's home in Laurel, Indiana. Holland, the four boys, and a few others played video games for much of the night. Between 2 a.m. and 3 a.m. the following morning (June 7), D.L. suggested that they defecate in a bag, light it on fire, and put it on the front steps of a schoolmate's home. After deciding against the idea, the conversation turned to the "haunted house" that was a block away from Holland's home. *Transcript* at 208. Holland informed the boys that the house used to be a hangout for the Ku Klux Klan and suggested that they burn the house down. With little reluctance from the group, Holland and the four boys went to Holland's garage to make Molotov cocktails. Holland instructed them to pour gasoline into some Bud

[1] Ind. Code Ann. § 35-41-2-4 (West, Premise through 2008 2nd Regular Sess.)(aiding, inducing or causing an offense); Ind. Code Ann. § 35-43-1-1 (West, Premise through 2008 2nd Regular Sess.)(arson).

[2] Ind. Code Ann. § 35-47.5-5-5 (West, Premise through 2008 2nd Regular Sess.).

Light bottles and to tear apart rags to use as wicks. Holland used a rag to wipe his fingerprints from the bottles because, he admitted to the boys, he had a criminal record and did not want to get caught. Holland gave the boys guidance as to where the most wood was to burn in the haunted house. Holland also instructed everyone what their alibi would be, i.e., around 3 a.m. they all went down the road to a store to use a soda machine when Holland's brother came and told them that the house down the block was on fire.

D.G., D.L., and J.G. then went to the haunted house, with Molotov cocktails in hand. D.G. went upstairs while D.L. and J.G. stayed downstairs. Each of the three boys threw a couple of bottles, and the house began to burn. It took three to five minutes for the boys to go to the house, set it ablaze, and then flee. The three boys returned to Holland's home, washed the gasoline smell from their hands, and began playing video games again. In the meantime, Holland and C.L. walked to a nearby store to purchase sodas. When Holland and C.L. returned to Holland's home, D.G., D.L., and J.G. described what happened when they went to the haunted house and threw the Molotov cocktails. Holland threatened the boys, telling them that if anyone told what had occurred, he would kill them and their families. Holland and the boys waited a few minutes and then they went outside to watch the house burn.

Each of the boys was eventually interviewed by Bradley Spurlock, the Laurel Fire Marshal. During interviews conducted on June 9, 2007, each of the boys told the same story that Holland had rehearsed with them. Holland was interviewed and corroborated the fabricated alibi. Holland then contacted Spurlock later that same day and asked to speak with

him. During an interview at Holland's home, Holland told Spurlock that he had lied in his first statement and then implicated D.L. as the individual who started the fire. Spurlock continued his investigation and ultimately obtained full confessions from each of the four boys involved, including details of Holland's involvement. Holland, however, never admitted to helping the boys or being involved in any way with the fire. In a subsequent search of Holland's garage, authorities found empty Bud Light bottles, the gasoline can used to fill the bottles, and the rags that were torn apart to be used as wicks.

On June 15, 2006, the State charged Holland with Count I, aiding, inducing or causing arson, a class B felony; Count II, distributing a destructive device to a minor, a class B felony; and Count III, being a convicted felon and possessing, manufacturing, transporting, or distributing a regulated explosive, a class C felony. A three-day jury trial commenced on April 28, 2008. At trial, each of Holland's four confederates testified regarding Holland's involvement as the one who supplied the materials and helped make the Molotov cocktails and encouraged them to burn down the haunted house. At the conclusion of the evidence, the jury found Holland guilty of Counts I and II.

The trial court held a sentencing hearing on June 25, 2008. At sentencing, the State elicited testimony from the owner of the home that he had spent over $200,000 restoring it. The owner did not, however, have receipts or other substantiation of the amount. The Franklin County Assessor offered assessment records for the home, valuing it at $52,600 just before the fire. After the fire, the property was valued at $26,000. The trial court sentenced Holland to twenty-year terms on each conviction with the sentences to be served

concurrently. Regarding restitution, the trial court stated: "the Court's understanding of the State's request is that seventy-two thousand is reasonable and would cover any expenses still associated with the loss and how to deal with it." *Sentencing Transcript* at 25. The trial court thus ordered Holland to pay costs and $72,000 in restitution.

1.

Holland argues that the evidence is insufficient to support his convictions, specifically invoking the incredible dubiosity rule. When considering a challenge to the sufficiency of evidence to support a conviction, we respect the fact-finder's exclusive province to weigh the evidence and therefore neither reweigh the evidence nor judge witness credibility. *McHenry v. State*, 820 N.E.2d 124 (Ind. 2005). We will impinge on the jury's responsibility to judge the credibility of the witnesses only when it has confronted inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiosity. *Tillman v. State*, 642 N.E.2d 221 (Ind. 1994). Holland correctly cites the law relating to the incredible dubiosity rule, that is, it "is limited to cases . . . where a *sole witness* presents inherently contradictory testimony which is equivocal or the result of coercion and there is a *complete lack of circumstantial evidence* of the appellant's guilt." *See id.* at 223 (emphasis supplied). Holland acknowledges that the incredible dubiosity rule is not applicable where the evidence is not from a single witness and there is not an absence of circumstantial evidence of guilt, s*ee Thompson v. State*, 765 N.E.2d 1273 (Ind. 2002), or where the inconsistencies are between the testimony of several witnesses, *see Ferrell v. State*, 746 N.E.2d 48 (Ind. 2001). Holland further acknowledges that inconsistencies between a witnesses pre-trial statement

and his trial testimony do not render the testimony inherently contradictory. *Corbett v. state*, 764 N.E.2d 622 (Ind. 2002).

Despite the law, Holland nevertheless argues that the testimony of his four confederates, D.L, C.L., J.G., and D.G., is inherently incredible, pointing out inconsistencies between the testimony of the different witnesses, as well as inconsistencies between the pre-trial statement and trial testimony of each witness. We begin by noting that the incredible dubiosity rule is not available to Holland because more than one witness testified. Further, while the testimony of Holland's confederates may have been inconsistent in parts, such inconsistencies were for the jury to account for in assessing witness credibility. Under these circumstances, we will not impinge on the jury's responsibility to weigh the evidence and judge the credibility of the witnesses.

Incredible dubiosity aside, the evidence is sufficient to support Holland's convictions. D.L. and J.G. stated that it was Holland's idea to start the fire, while everyone testified that Holland provided the materials and helped make the Molotov cocktails. Holland also directed D.G. and J.G. to the best areas in the house to target in setting the house ablaze. Finally, testimony established that Holland threatened the boys if they told what had transpired and concocted the alibi that each of them first told to authorities when initially questioned about the fire. The State also established that all of Holland's confederates were under eighteen years of age. The State's evidence is sufficient to sustain Holland's convictions for aiding, inducing, or causing arson, as well as for distributing a destructive device to minors.

2.

Holland argues that his convictions for aiding, inducing, or causing arson and distributing a destructive device to a minor violate the State's prohibition against double jeopardy found in article 1, section 14 of the Indiana Constitution. Our Supreme Court has established a two-part test for analyzing state double jeopardy claims. According to that test, multiple offenses are the same offense in violation of article 1, section 14, "if, with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense." *Richardson v. State*, 717 N.E.2d 32, 49 (Ind. 1999).

Holland raises his claim under the actual evidence test. Thus, we must determine whether there is a reasonable possibility that the evidentiary facts used by the jury to establish the essential elements of one offense may also have been used to establish all of the essential elements of the other offense. *See Davis v. State*, 770 N.E.2d 319 (Ind. 2002); *see also Bradley v. State*, 867 N.E.2d 1282 (Ind. 2007) (the proper inquiry is not whether there is a reasonable probability that the trier of fact used different facts, but whether it is reasonably possible it used the same facts to convict the defendant of both charges). Under this inquiry, we may examine the evidence, charging information, final jury instructions, and arguments of counsel to determine whether each offense was established by separate and distinct facts. *See Goldsberry v. State*, 821 N.E.2d 447 (Ind. Ct. App. 2005); *see also Bruce v. State*, 749 N.E.2d 587, 590 (Ind. Ct. App. 2001) ("identification of the evidentiary facts used by the jury

in reaching its decision may be informed by consideration of the final jury instructions and argument of counsel"), *trans. denied*.

Here, it is not reasonably possible that the jury relied on the same facts to find Holland guilty of both charges. To be sure, while distribution of a destructive device, i.e., a Molotov cocktail, was key to establishing both offenses, additional evidence was necessary to establish remaining elements of each charge. For instance, to establish all of the elements of Count I, the State presented evidence that J.G., D.L., and D.G. committed the offense of arson in addition to evidence that he aided, induced or caused them to commit arson by providing them with a destructive device (i.e., a Molotov cocktail). To establish all of the elements of Count II, the State presented evidence that Holland knowingly or intentionally distributed or offered to distribute a destructive device to the three boys and that the three boys were less than eighteen years of age. Thus, in addition to the evidence that Holland distributed a destructive device (i.e., a Molotov cocktail), the State presented evidence establishing that the individuals to whom he distributed such device were under the age of eighteen. Thus, the evidence used in finding Holland guilty of Count I did not establish all of the elements of Count II, and vice versa. We therefore conclude that there is no violation of the actual evidence test. Accordingly, we conclude that Holland's convictions do not violate the State's prohibition against double jeopardy.

3.

Holland argues that the trial court abused its discretion in ordering him to pay $72,000 in restitution to the owner of the home that was damaged. We must agree.

A restitution order must be supported by sufficient evidence of actual loss sustained by the victim or victims of a crime. *See Lohmiller v. State*, 884 N.E.2d 903 (Ind. Ct. App. 2008). "The amount of actual loss is a factual matter that can be determined only upon the presentation of evidence." *Bennett v. State*, 862 N.E.2d 1281, 1286 (Ind. Ct. App. 2007). We review a trial court's order of restitution for an abuse of discretion. *Bennett v. State*, 862 N.E.2d 1281.

Ind. Code Ann. § 35-50-5-3 (West, Premise through 2008 2nd Regular Sess.) provides as follows:

> (a) [I]n addition to any sentence imposed under this article for a felony or misdemeanor, the court may, as a condition of probation or without placing the person on probation, order the person to make restitution to the victim of the crime . . . . The court shall base its restitution order upon a consideration of:
>
> (1) property damages of the victim incurred as a result of the crime, based on the actual cost of repair (or replacement if repair is inappropriate) . . . .

At the sentencing hearing, Jim Hough, the owner of the home damaged by the fire, claimed a loss of $200,000. He, however, presented no evidence or receipts to support his claim. Hough further testified that the house would have to be torn down, but provided no estimates of the cost to do so. In contrast, the township assessor testified that the property was valued at $71,500 in 2002. The assessed value was lowered to $47,200 in 2003 because the home had no plumbing. In March 2006, the home was valued at $52,600. After the fire, the real estate was valued at $26,300. The State also acknowledged that even if the home was a total loss, the lot would still have some value. The trial court considered the above evidence and ordered Holland to pay restitution of $72,000.

The trial court's restitution order is not supported by the evidence as it is not reflective of property damages incurred as a result of the crime. In his brief Holland sets forth the following calculus for determining an appropriate amount of restitution, with which the State agrees: the value of the lot should be deducted from the value in the property assessment just before the fire and the costs related to demolition and removal of the building should be added. This calculation is not possible, however, without further documentation. We therefore reverse the trial court's restitution order and remand for an evidentiary hearing as to restitution.

Judgment affirmed in part, reversed in part, and remanded.

MAY, J., and BRADFORD, J., concur